

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of KOTZ, Minors.

UNPUBLISHED

May 20, 2014

No. 317450

Wayne Circuit Court

Family Division

LC No. 13-511545-NA

In the Matter of KOTZ, Minors.

No. 317453

Wayne Circuit Court

Family Division

LC No. 13-511545-NA

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

These appeals have been consolidated for appellate review. In Docket No. 317450, respondent-mother appeals as of right from the trial court's order terminating her parental rights to the two minor children under MCL 712A.19b(3)(b)(ii), (g), and (j). In Docket No. 317453, respondent-father appeals as of right from the trial court's order terminating his parental rights to the two minor children under MCL 712A.19b(3)(b)(i), (g), and (j). We affirm.

I. STANDARD OF REVIEW

To terminate a respondent's parental rights, the trial court must first find that at least one of the statutory grounds listed in MCL 712A.19b(3) has been established by clear and convincing evidence. *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010). We review the trial court's factual findings as well as its determination that a statutory ground has been established for clear error. *Id.* See also MCR 3.977(K). A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Id.* See also MCR 3.902(A); MCR 2.613(C).

If the trial court finds that there are grounds for termination of parental rights, it must then determine whether termination is in the child's best interests. MCL 712A.19b(5). A trial court may consider all the evidence in the record in making its best-interest determination. *In re*

Trejo, 462 Mich 341, 356; 612 NW2d 407 (2000). The question whether termination is in the best interests of the child is reviewed for clear error and must be supported by a preponderance of the evidence. *Id.*; *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013).

II. STATUTORY GROUNDS

Both respondents argue that the trial court clearly erred in finding that there were statutory grounds for termination of respondents' parental rights. First, with regard to respondent-mother, we find that the trial court did not clearly err in finding that there was clear and convincing evidence to terminate her parental rights pursuant to MCL 712A.19b(3)(b)(ii), which provides,

(b) The child or a sibling of the child has suffered physical injury or sexual abuse under 1 or more of the following circumstances:

* * *

(ii) The parent who had the opportunity to prevent the physical injury or physical or sexual abuse failed to do so and the court finds that there is a reasonable likelihood that the child will suffer injury or abuse in the foreseeable future if placed in the parent's home.

The trial court properly found that respondent-mother, having the opportunity to protect her children from physical abuse and injury, failed to do so. Respondent-mother contends that because there was no evidence she was aware that respondent-father was a threat to her children, she could not have failed to protect them. This argument is unpersuasive. The testimony showed that the infant sustained rib fractures, which are generally non-accidental. The evidence showed that the fractures were not, as respondent-mother claimed, from an unknown cause. Respondent-mother admitted respondent-father told her of crackling sounds in the infant's chest, but she failed to seek out medical attention for the infant. Additionally, the ribs on the infant's right and left sides were not believed to have been fractured simultaneously. The evidence indicated that the infant was likely abused on more than one occasion and respondent-mother failed to address the situation and protect the infant.

Second, with regard to respondent-father, we find that the trial court did not clearly err in finding that there was clear and convincing evidence to terminate his parental rights pursuant to MCL 712A.19b(3)(b)(i), which provides,

(b) The child or a sibling of the child has suffered physical injury or sexual abuse under 1 or more of the following circumstances:

(i) The parent's act caused the physical injury or physical or sexual abuse and the court finds that there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in the parent's home.

The trial court properly found that the child's injuries were non-accidental and caused by respondent-father, the child's primary caregiver. The evidence established that the infant suffered a fractured arm and several fractured ribs while in respondent-father's care. Although

the fractured arm could have been accidental, the explanation given by respondent-father for the rib fractures was not plausible. Expert witnesses testified that rib fractures in infants are generally non-accidental because they require extreme amounts of force and velocity to accomplish. Both respondents tried to blame the older child, who was just 17 months old at the time, but there was testimony from medical experts that a child of that age could not inflict the injuries observed on the infant. The only viable explanation for the rib fractures was that the infant had been physically abused.

Finally, with regard to both respondents, we find that the trial court did not clearly err in finding that there was clear and convincing evidence to terminate their parental rights pursuant to MCL 712A.19b(3)(g) and (j), which provide,

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent that the child will be harmed if he or she is returned to the home of the parent.

The evidence showed that respondent-father intentionally caused the infant's rib fractures and neither respondent sought medical care for the infant after hearing unusual sounds from the infant's chest. Given the extreme physical abuse respondent-father subjected the infant to, and his obvious propensity toward violence when the children overwhelmed him, there is a reasonable likelihood that he is unable to provide proper care and custody and that the children would be at risk of harm in his care.

Likewise, the evidence shows that there is a reasonable likelihood that respondent-mother is unable to provide proper care and custody for the children and they would also be at risk of harm in her case. Respondent-mother failed to obtain medical attention for her child even after respondent-father told her the baby's chest was making an unusual sound. Even if respondent-mother did not initially realize that respondent-father was a threat to her children, she did not take steps to protect them once she was informed of the abuse. It was only during her testimony on the last day of the termination hearing that respondent-mother indicated her plans to distance herself from respondent-father. There was no evidence that respondent-mother had already separated herself from respondent-father or that she would protect her children from him.

Respondent-mother's contention that she could not be expected to know when the infant was hurt because the medical community did not agree on the timing mechanism of the infant's injuries is misleading. The stage of healing observed by medical professionals indicated a time range in which the fractures occurred. Although respondent-mother was not expected to know exactly when the infant sustained the injury, she was aware that respondent-father had heard crackling sounds in the infant's chest, and she should have noticed if her infant son was in a lot of pain or had irregular breathing, as occurs with infant rib fractures.

Accordingly, we find that the trial court did not clearly err in finding that there were statutory grounds for termination of respondents' parental rights.

III. BEST-INTERESTS DETERMINATION

Next, respondents argue that termination of their parental rights was not in the children's best interests. As stated, once the trial court finds that there are grounds for termination of parental rights, it must then determine whether termination is in the child's best interests. MCL 712A.19b(5).

First, the trial court did not clearly err in finding that termination of respondent-father's parental rights was in the children's best interests. It was in the young children's best interests to be raised in an environment free of physical abuse. Respondent-father argues that the trial court did not consider his bond with the children. This argument is unpersuasive. Even if respondent-father was closely bonded with the children and loving at times, their safety and security was more important than any bond. Respondent-father also argues that, when considering the children's best interests, the trial court did not elaborate on the risk that the children may not be adopted by family or that the two brothers may be separated from one another. This contention is also unpersuasive. The children were placed with the maternal grandparents who were hopeful that a family member would adopt them. Moreover, the risk of the children being severely beaten in respondent-father's care is more of a concern than the risk of them not being adopted by family or being separated.

The trial court also did not clearly err in finding that termination of respondent-mother's parental rights was in the children's best interests. Respondent-mother argues that the trial court did not consider each child's bond to her and that she was not alleged to be an unfit parent. She argues that a Clinic for Child Study evaluation should have been ordered to assess whether she had the ability to provide the children with a safe and stable environment. These claims are without merit. Even if respondent-mother had a strong bond with her children, it is clear she cannot provide a safe environment for them and her demonstrated poor judgment put them at a life-threatening risk of harm.

Respondent-mother also argues that the trial court's decision to terminate her parental rights does not make sense because the children were doing well in placement with their maternal grandparents. The trial court specifically addressed placement recognizing that it was not the maternal grandmother's desire to adopt the children, given her age and her husband's medical conditions. Accordingly, the trial court did not clearly err by finding that termination of respondents' parental rights was in the children's best interests.

IV. REASONABLE EFFORTS

Next, respondents argue that petitioner should have provided services to them before the trial court terminated their parental rights. Generally, the petitioner is required to make reasonable efforts to rectify the conditions that caused a child's removal by adopting a service plan, except when termination of parental rights is the agency's goal. *In re HRC*, 286 Mich App 444, 462-464; 781 NW2d 105 (2009). See also MCR 3.977(E); MCL 712A.18f. By statute and court rule, the petitioner is permitted to request termination in the initial petition. MCL

712A.19b(4); MCR 3.961(B)(6). Pursuant to MCR 3.977(E), termination of parental rights is required at the initial disposition hearing and additional reunification efforts shall not be ordered if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);

(4) termination of parental rights is in the child's best interests.

In this case, the initial petition sought termination of respondents' parental rights. The trial court found by a preponderance of the evidence that there were grounds to assume jurisdiction over the children under MCL 712A.2(b), specifically, lack of proper custody, physical injury to the children, and failure to provide proper medical care. Further, the trial court determined, by clear and convincing evidence, that there were statutory grounds for termination and that termination was in the children's best interests. Therefore, because termination was the agency's initial goal, and because the requirements of MCR 3.977(E) were met, no reunification efforts were required.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, respondent-mother contends that her trial counsel was ineffective. The principles of ineffective assistance of counsel in criminal proceedings also apply to child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). Thus, to establish a claim of ineffective assistance of counsel, respondent-mother must show that her counsel's performance was deficient in that it fell below an objective standard of reasonableness and that she was prejudiced by counsel's deficient performance. *Id.* at 198. To establish prejudice, respondent-mother must show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* (quotation marks and citation omitted). Counsel is presumed to have provided effective assistance, and respondent-mother must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Horn*, 279 Mich App 31, 37-38; 755 NW2d 212 (2008).

First, respondent-mother argues that counsel's cross-examination of petitioner's witnesses was nonexistent and counsel lacked preparation. Specifically, she argues that testimony of two of the doctors regarding the timing of the infant's rib fractures was

contradictory. However, a review of the testimony does not support that assertion. Further, given that a more-thorough cross-examination might have bolstered petitioner's case by emphasizing the details of the infant's injuries, it would not have been unreasonable for counsel to limit the cross-examination. Accordingly, respondent-mother has failed to overcome the strong presumption that counsel's decision was sound trial strategy.

Next, respondent-mother argues that counsel should have called a medical expert to testify. There were discussions at the preliminary hearing that counsel was working hard to obtain a medical expert, and the trial court expressed its concern about affordability for respondent-mother. Given that the evidence against respondents was strong, it may not have been practical for counsel to obtain an expert witness. Thus, respondent-mother is unable to overcome the strong presumption that counsel's decision to forego an expert witness was sound trial strategy.

Further, contrary to respondent-mother's contention, it was unwarranted for trial counsel to request that the court appoint an expert to assist him in understanding medical issues. There is no reason to believe that trial counsel did not understand the medical issues in this case as they were not particularly complicated. Respondent-mother's claim that trial counsel could have elicited testimony that the infant suffered from a bone disorder that might have caused him to break or bruise easily is dubious. Medical records and testimony from the pediatrician and hospital showed that the infant was a normal, healthy child and did not have a bone disorder or bruising problem.

Respondent-mother also briefly argues that counsel should have called a foster care worker to testify because her reports indicated that she would have recommended against termination of parental rights. However, even if the foster care worker had testified, it is unlikely that it would have changed the outcome of the case, given that her recommendation went against DHS policy, and there was clear signs of physical abuse that respondent-mother failed to prevent.

Finally, respondent-mother claims that trial counsel failed to raise hearsay objections, but she fails to indicate which hearsay objections should have been raised, and thus, we decline to address this issue. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003).

Accordingly, respondent-mother has failed to show that her counsel was ineffective.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly